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State of Michigan
Judicial Tenure Commission

May 10, 2005

Mr. Corbin R. Davis
Clerk of the Court
Michigan Supreme Court
925 W. Ottawa
Lansing, Michigan 48933

**Re: ADM File No. 2004-60
Comment on proposal**

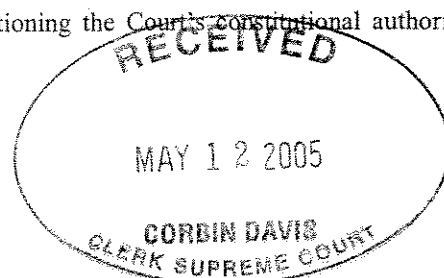
Dear Mr. Davis,

The Judicial Tenure Commission ("Commission") has reviewed the Court's order in this administrative file considering changes to MCR 9.205. The Commission is already on the record as supporting costs in judicial discipline proceedings.¹ The following comments have been approved by the Commission and are intended to explain why.

Policy considerations for costs in judicial discipline proceedings

Where a judge engages in misrepresentations, falsehoods, or deliberate obstruction of the investigative process, that judge's lies grossly undermine the public's confidence in the integrity of the judicial system. If the lie is told under oath, it vitiates the public's trust in the judiciary as a peaceful means to resolve disputes. If the judges cannot be trusted to tell the truth, no member of the public should be trusted to do so either. A judge who lies is inimical to the judicial system and the judicial process. If left untreated, this cancer would destroy the

¹ Some Commissioners agree with Justice Weaver's position questioning the Court's constitutional authority to assess costs in judicial discipline cases.



very principle underpinning our civilization: turning to the judiciary, rather than to arms, to seek redress for wrongs. A judge's lying is so egregious, the Court should have the option of making that judge pay the cost of prosecution as part of the sanction imposed.

Having in place the mechanics to allow imposition of costs in those cases where costs are appropriate may help bring more certainty to the judicial discipline process. If a judge realizes that a falsehood could very well result in his or her having to pay the cost of the proceeding, it seems likely that that judge would be more assiduous with the truth. If the judge has already been caught in a misrepresentation, the judge may be more willing to negotiate a resolution and thus avoid risking having to bear the brunt of the cost of his or her own prosecution.

A review of costs in judicial discipline proceedings

In Michigan, there is no specific court rule or statutory provision for imposing costs or restitution in judicial disciplinary matters, although the Supreme Court has done so on several occasions. In imposing discipline in the very first formal complaint,² the Court imposed \$1,000 in costs as partial reimbursement for the cost of the proceedings, in addition to the public censure of the respondent.³ In Formal Complaint No. 5, *In re Edgar*, and Formal Complaint No. 6, *In re Blodgett*, the Court ordered public censures and \$1,500 and \$1,000 costs, respectively, as partial reimbursement of the costs of the proceedings.⁴ *See too In re Cooley*, 454 Mich 1215 (1997). More recently the Court ordered the respondent to pay the Commission costs in *In re Trudel*, 468 Mich 1244 (2003) (\$12,777.33) and *In re*

² Formal Complaint No 1, *In re Somers*, 384 Mich 320 (1971).

³ The Court ordered that the costs be paid to the Clerk of the Supreme Court. The order for costs was apparently entered separately from the Court's opinion, as it is not included in the text of the opinion found at 384 Mich 320.

⁴ Interestingly, these two cases were never published in the official volumes of the Michigan Reporter. In both cases, the Court ordered the respondent to appear before it "for the administration of censure and the determination of punishment."

Thompson, 470 Mich 1347 (2004) (\$11,117.32), but denied a recommendation for costs in *In re Noecker*, 474 Mich 1 (2005).⁵

The Commission adopted the following standard regarding imposing costs in its Decision and Recommendation in *Noecker*, *supra*:

“Conduct that debases the judicial process, such as lying, falsifying, or evading, or corrodes faith in the judicial system, such as an abuse of the office, whether or not for personal gain, requires special condemnation, including requiring the respondent to bear the cost of prosecution.”

Although not adopted at the time, this standard would have been applicable in the *Trudel* matter, as the Respondent avoided the hearing on the formal complaint, falsely applied for worker’s compensation benefits, and used his sick time to treat himself to extended vacations in California. That type of fraud on the public warranted the imposition of costs.⁶

In *In re Chrzanowski*, 465 Mich 468 (2001), the respondent made false statements to the police in the course of the investigation of a murder case. However, she corrected those false statements within a matter of days, and there was never any reason to believe that the investigatory process was delayed or otherwise interfered with. In *Noecker*, *supra*, the master, the Commission, and the Court all agreed that the Respondent had not been truthful in his responses to the Commission or in the pleadings he filed. Worse still, he perpetuated his falsehoods during the hearing on the formal complaint, testifying under oath to matters that were untrue.

⁵ The Court distinguished the *Noecker* decision from *Trudel* and *Thompson* in that neither Judge Thompson nor former Judge Trudel had argued against the imposition of costs in the Supreme Court, while former Judge Noecker had done so. That, however, is a non-distinction. After all, either the Court *has* the authority to impose costs, or it does not. The Court’s power is not created by a judge choosing to challenge the Court’s authority to do that very act.

⁶ The Commission can even envision other circumstances where costs might be warranted. If there is no dispute as to the facts, but only the conclusions to be drawn from those facts, it seems an inordinate waste of money and resources to force a matter to a hearing. If a respondent does not challenge the facts, a matter can be submitted to the Commission on a set of stipulated facts. Failing to do so, it seems, may be further grounds for making the Respondent the one to bear the (unnecessary) costs incurred in holding an unnecessary hearing.

Legal Authority

Some may argue that imposition of financial sanctions is specifically prohibited if not provided by statute. Other courts have routinely rejected such positions. In a leading case, *Matter of Cieminski*, 270 NW2d 321 (ND 1978), Judge Cieminski contended the North Dakota Supreme Court lacked authority to impose costs against him in light of a statute prohibiting an award of costs, that costs could be awarded only to the extent authorized by statute, and in the absence of a statute governing disciplinary cases, no costs could be assessed. The North Dakota Supreme Court found:

Disciplinary proceedings are neither civil nor criminal. consequently

the rules pertaining to either do not necessarily apply. Specifically, Rule 54(e), NDRCivP, pertaining to costs and disbursements, does not apply for several reasons. Initially, Rule 54(e) is predicated on the common practice that the prevailing party is entitled to its costs and disbursements. As stated earlier, ***assessment of costs is a part of the disciplinary action and is not the same as awarding costs to either party*** as prohibited by sec. 27-23-11, NDCC, or as contemplated by Rule 54(e), NDRCivP. *Id.* at 334-335. (Emphasis added)

The court further noted:

The assessment of costs as a part of a disciplinary action is more than a censure, less than a suspension, but has a useful purpose and serves as a deterrent to conduct not in harmony with the Code of Judicial Conduct. *Id.* at 335.

In drawing its conclusion, the court cited the well-established body of law holding that authorization to censure or remove implicitly includes the authority to impose lesser sanctions and considered the imposition of costs a lesser-included sanction.

The Rhode Island Supreme Court similarly recognized the authority of its commission to recommend sanctions beyond the typical specified provisions of censure, suspension, retirement and removal, and its own authority to impose other sanctions. *In re Almeida*, 611 A2d 1375 (1992). In *Almeida*, the respondent judge requested the Court to reject the commission's recommendation that the court terminate his pension benefits retroactive to the date of his retirement and order him to repay those pension payments previously made. He challenged both the commission's authority to recommend termination of the pension and the authority of the court to terminate the pension. He further contended that the termination of his pension rights was a disproportionate penalty in violation of the Rhode Island Constitution. The court determined that authority to remove a judge from judicial office implicitly carries with it the authority to recommend suspension of an active retired justice's pension benefits.

In order to ensure the integrity of the judiciary, we find that *there are sanctions and remedial actions available that may not be expressly stated* as one of the enumerated categories of § 8-16-4. Mere exclusion of every possible potential sanction does not mean that the Legislature specifically intended to limit possible courses of action. Rather certain remedies may be implicit within the general categories of § 8-16-4 and necessary for the orderly interpretation and implementation of the statute. *The enumerated categories of possible recommendations are guideposts rather than strict limitations on the extent of sanctions the commission may recommend.* We believe that *within the recommendation of removal of a member of the judiciary as a remedy is the implicit power to recommend those penalties incidental to a judge's removal.* In the present case we find that incidental to the removal of petitioner from his standing as an active retired justice is termination of his pension benefits.

Some courts espouse the view that removal of the duties and obligations of the position includes removal and forfeiture of the rights and benefits accruing by virtue of the position, including retirement benefits. See *Hogan v Bronner*, 491 So.2d 226, 227 (Ala. 1986); *Ballurion v Castellini*, 29 N. J. Super. 383, 390, 102 A2d 662, 666 (1954). We find this statement of law to be appropriate and

applicable in meeting the goals sought to be achieved by the Legislature in this jurisdiction. In the present case we find that removal of a retired justice carries with it the implication that his or her continued right to receive pension benefits should be considered. *Therefore, the authority to recommend removal from office implicitly carries with it the authority to recommend remedial measures necessary to effectuate the statute, including, but not limited to, suspension of the removed retired justice's pension benefits.* The commission's recommendations are, in fact, only recommendations that provide guidance and assistance to this court in its determination of the appropriate course of action. The commission acts, therefore, as a reference source for this court on the issue of removal and imposition of penalties upon a member of the Judiciary. Pursuant to § 8-16-6(a), as amended by P.L.1987, ch. 492, § 1, the Legislature expressly granted this court significant latitude with respect to considering the commission's recommendations, providing: The supreme court may, upon review of a recommendation of censure, suspension, immediate temporary suspension, reprimand, retirement, or removal, affirm, modify, or reject such recommendation of the commission. . . (Emphasis added) *Id.* at 1380-1381.

The authority in Const 1963, art 6, § 30 to "censure" a judge necessarily carries with it the authority to impose the costs of prosecution as part of that censure. Merriam-Webster's Online dictionary defines "censure" as: "a judgment involving condemnation; 2 archaic : OPINION, JUDGMENT; 3 : the act of blaming or condemning sternly; 4 : an official reprimand." The American Heritage On-Line Dictionary defines "censure" as "1. An expression of strong disapproval or harsh criticism. 2. An official rebuke, as by a legislature of one of its members. TRANSITIVE VERB: 1. To criticize severely; blame. See synonyms at criticize. 2. To express official disapproval of."

There can be little disputing the proposition that among the sharpest civil means available to express disapproval of an action or to reprimand someone for improper behavior is to impose a monetary sanction as part of that process. Courts impose fines (granted, pursuant to statutes or court rules), professional sports associations impose fines (granted, by virtue of contractual agreements) and the

Mr. Corbin Davis

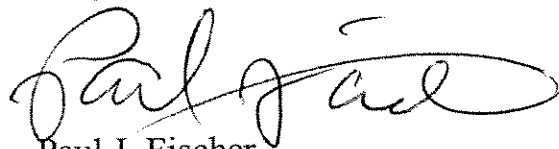
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Michigan constitution bestows that power on the Supreme Court by allowing for "censure" of a judge. Sometimes it is not enough to say, "Bad judge, bad judge." Sometimes it really is a matter of putting one's money where one's mouth is, in the words of the vernacular, or, more appropriately under these circumstances, of the *Court* putting the judge's money where his mouth was.

The Court should implement a rules change to allow for the assessment of costs in judicial discipline matters as set forth above. A judge who commits misconduct should not be allowed to multiply the damage done to the integrity of the judicial system by then lying. That would result in a further attack not only on the integrity of the judicial system, but on the integrity of the judicial *discipline* system. Forcing the perpetrator of such falsehoods to cover the resulting monetary costs is a small step in healing the attack on that integrity.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul J. Fischer", with a large, sweeping flourish at the end.

Paul J. Fischer
Executive Director and
General Counsel

PJF/wsb

cc: To All Commission Members

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